

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD YOUNG, JR.,

Defendant-Appellant.

UNPUBLISHED

September 22, 2000

No. 213431

Wayne Circuit Court

LC No. 97-001926

Before: Cavanagh, P.J., and Saad and Meter, JJ.

PER CURIAM.

Defendant was convicted of possession with intent to deliver 225 grams or more, but less than 650 grams, of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). He was sentenced to twenty to thirty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the prosecutor improperly testified regarding factual matters based on his personal knowledge and rendered his personal opinion regarding defendant's guilt during his closing argument. We review claims of prosecutorial misconduct to determine whether a defendant was denied a fair and impartial trial. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). However, because defendant failed to object to the prosecutor's comments at trial, we will review the issue only if a curative instruction could not have eliminated the prejudicial effect of the prosecutor's comments or if failure to review the issue would result in a miscarriage of justice. *Id.* at 512; *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996).

A prosecutor may not use the prestige of his office to inject his personal opinion into the case. *People v Bahoda*, 448 Mich 261, 286; 531 NW2d 659 (1995). Moreover, a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, but may argue from the evidence and inferences drawn therefrom that a defendant committed the offense charged. *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992); *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992). After reviewing the prosecutor's comments as a whole, we conclude that the contested remarks, within the context of the prosecutor's closing argument, constituted proper argument from the evidence and inferences drawn therefrom. See *Stacy, supra* at 37. The statements that defendant was a "substantial cocaine dealer," a "sizeable cocaine dealer," and a "dope dealer" were

proper comments based on the evidence presented regarding the amount of cocaine defendant possessed at the time of his arrest. Considering the large amount of cocaine involved, the prosecutor's remarks were fair comments on the evidence and did not constitute improper testimony based on the prosecutor's personal knowledge. See *id.*

The prosecutor also argued that defendant was "far worse" than Christopher Maurer, the informant. Evidence had been presented regarding both Maurer's and defendant's drug sales and the prosecutor was comparing the drug trafficking of both individuals. Because evidence of the drug-selling habits of both individuals was presented at trial, the prosecutor properly commented on the evidence and drew inferences therefrom during his closing argument. See *id.* Furthermore, the prosecutor commented that defendant was selling drugs in a Dunkin Donuts parking lot. While the record did not explicitly reveal that defendant was selling drugs at that time, it was a reasonable inference that could have been drawn from the circumstances. See *id.*

Moreover, the trial court instructed the jury to consider only the evidence presented in the case in making its decision and informed the jury that the attorneys' arguments were not evidence. Juries are presumed to have followed the instructions of the trial court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, we conclude that there was no prosecutorial misconduct requiring reversal in this case.

Defendant next argues that he was denied the effective assistance of counsel. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, because of such representation, he was prejudiced to the extent that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must show that, but for trial counsel's errors, there is a reasonable probability that the result of the proceeding would have been different and overcome the strong presumption that counsel's actions constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Because defendant failed to preserve this issue for appeal by moving for a new trial or an evidentiary hearing, our review is limited to errors apparent on the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

Defendant contends that trial counsel was ineffective for failing to object to the prosecutor's remarks during closing argument. However, given our determination that the remarks were not improper, such an objection would have been futile and defense counsel is not required to raise a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant also contends that counsel was ineffective for failing to assert the defense of entrapment. A defendant is entitled to have his attorney prepare, investigate, and assert all substantial defenses. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A defense attorney's failure to raise a substantial defense, where there is evidence to support the defense, may amount to ineffective assistance of counsel. *People v Moore*, 131 Mich App 416, 418; 345 NW2d 710 (1984). When a claim of ineffective assistance of counsel arises based on the failure to present a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense

and that the defense of which he was deprived was substantial. *Ayres, supra* at 22. A substantial defense is one which may have made a difference in the outcome of the trial. *Id.*

After carefully reviewing the record, we conclude that defendant has not shown that he made a good-faith effort to avail himself of the right to present an entrapment defense at trial. See *id.* Additionally, defendant has failed to show that the defense of entrapment was substantial and may have made a difference in the outcome of the trial. See *id.* Entrapment exists if either: (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated by the court. *People v Hampton*, 237 Mich App 143, 156; 603 NW2d 270 (1999); *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). Entrapment is proven under the first test if the police conduct would induce a person not otherwise ready and willing to commit an offense to commit the offense charged. *People v Fabiano*, 192 Mich App 523, 531; 482 NW2d 467 (1992). In making this determination, the trial court may consider the defendant's circumstances and the effects of the police conduct upon a normally law-abiding person in similar circumstances as the defendant. *Id.* at 527. Many factors are analyzed to determine whether the police activity would induce criminal conduct. See *People v Juillet*, 439 Mich 34, 56-57; 475 NW2d 786 (1991) (Brickley, J); *People v Williams*, 196 Mich App 656, 661-662; 493 NW2d 507 (1992). The mere furnishing of an opportunity to commit an offense, however, is not entrapment. *Ealy, supra* at 510.

Although there was evidence that defendant and Maurer were friends before the offense was committed, there was no evidence that the offense was preceded by any appeals to defendant's sympathy as a friend. There was furthermore no evidence of any inducements that would make the commission of the offense unusually attractive to a law-abiding citizen and no evidence of any government pressure or excessive enticement, guarantees that drug sales were not illegal, or offers of sexual favors. See *Williams, supra* at 661-662. While there was no direct evidence that defendant had sold drugs in the past, Maurer voluntarily gave Officer Daniel McKeon defendant's name when Maurer was asked about individuals who were involved in drug trafficking. Therefore, it can be inferred that Maurer had knowledge that defendant was involved in drug sales before Maurer purchased the cocaine involved in this case. Furthermore, while there was police control over Maurer and the investigation was targeted, there was not a lengthy time lapse between the investigation and the arrest and there is no evidence of the use of any government procedures that tended to escalate defendant's culpability. *Id.* Therefore, analyzing the factors enunciated in *Williams, supra*, the record fails to show that the police conduct would have induced a person not otherwise ready and willing to commit an offense to commit the offense charged. See *Fabiano, supra* at 531.

Entrapment is also proven if the police conduct was so reprehensible that, as a matter of public policy, it cannot be tolerated regardless of its relationship to the crime. *Hampton, supra* at 156; *Fabiano, supra* at 531-532. Police conduct is intolerable when the government uses continued pressure, appeals to friendship or sympathy, threats of arrest, an informant's vulnerability, sexual favors, or procedures which escalate criminal culpability. *People v Jamieson*, 436 Mich 61, 89; 461 NW2d 884 (1990) (Brickley, J). As previously discussed, there is no evidence that the police or Maurer used any of the above methods to induce defendant to sell cocaine to Maurer. Furthermore, there is no evidence that Maurer was particularly vulnerable. Therefore, the police conduct was not so

reprehensible that it could not be tolerated by the court. See *Hampton, supra* at 156; *Ealy, supra* at 510.

Because an entrapment defense would not have been successful under either test set forth in *Hampton, supra*, defendant has failed to prove that entrapment was a substantial defense of which he was deprived. See *Ayres, supra* at 22. As such, the assertion of the defense would not have made a difference in the outcome of the trial and defense counsel was not ineffective for failing to present the defense at trial. See *id.*

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Patrick M. Meter